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**"I'M YOUR THERAPIST, YOU CAN TELL ME  
ANYTHING": THE SUPREME COURT CONFIRMS  
THE PSYCHOTHERAPIST-PATIENT  
PRIVILEGE IN *JAFFEE V. REDMOND***

*Jennifer Sawyer Klein*

INTRODUCTION

*"For secrets are edged tools,  
And must be kept from children  
and from fools."<sup>1</sup>*

In John Dryden's time, and even today, his sentiments about the danger of divulging secrets certainly ring true. That truth, however, does not always apply. Oftentimes, justice requires that those "edged tools" be wielded in a court of law. Since Dryden's time, courts have established the maxim that the court has the "right to every man's evidence."<sup>2</sup> Testimonial or evidentiary privileges contravene that fundamental principle. Justice Frankfurter put it best when he stated that the courts must carefully scrutinize and strictly construe evidentiary privileges "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."<sup>3</sup>

The Supreme Court recently expanded the list of evidentiary privileges with its opinion in *Jaffee v. Redmond*.<sup>4</sup> The Court recognized that communications between a psychotherapist or social worker and her patient are privileged.<sup>5</sup> The Supreme Court held that a psychotherapist's records of her conversations with her police officer patient

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1. JOHN DRYDEN, SIR MARTIN MAR-ALL, in 9 THE WORKS OF JOHN DRYDEN 205, 236 (H.T. Swedenberg, Jr. et al. eds., 1966) (1667).

2. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (holding that exemptions from testifying on the basis of a predominant, protectable, "substantial individual interest" are justified).

3. *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting). Justice Frankfurter's position has been adopted by the Supreme Court in *United States v. Nixon*, 418 U.S. 683, 709-710 (1974).

4. 116 S. Ct. 1923 (1996).

5. *Id.* at 1931.

were privileged from both production in discovery and questioning as to their contents in a deposition.<sup>6</sup>

This Note examines the basis for the Court's decision in *Jaffee*, and its impact upon future cases which raised the question of a psychotherapist-patient privilege. Part I of this Note begins with a discussion of the history and impact of the judicial system's overall treatment of privileges. Part I continues with a look at the legislative history of Rule 501 of the Federal Rules of Evidence, the foundation of federal privilege law. Also discussed are scholarly and practical approaches to defining evidentiary privileges. Part I concludes with an exploration of the art of psychotherapy itself, the approaches to defining the psychotherapist, the justifications for establishing a psychotherapist privilege, the counter arguments against it, exceptions to the privilege, and the problems inherent in its application.

Part II discusses *Jaffee* in detail. Part III supports the Court's decision in *Jaffee* and its interpretation of Rule 501. Part III argues that the Wigmore test shows that the Court's decision was sound and argues against the rationales of the dissent. It points out that, contrary to the dissent's opinion, the Court correctly followed the lead of all fifty states in recognizing and establishing a psychotherapist-patient privilege in the federal courts. Further, Part III explores the majority's tactics in creating a privilege for psychotherapists, and then broadening the privilege to encompass social workers and counselors.

Part IV of this Note explores the impact of *Jaffee*—the creation of a new testimonial privilege in the federal court system. Part IV discusses the many questions the Supreme Court left unanswered in its failure to flesh out the contours and scope of the privilege, leaving future courts with a number of serious dilemmas with which to contend. This Note concludes that the psychotherapist-patient privilege falls under the requirement of "reason and experience" called for in Rule 501.<sup>7</sup> However, the Court's failure to completely define the privilege, its exceptions, and its applications makes the privilege difficult to apply. This Note further concludes that Congress should adopt an explicit psychotherapist-patient privilege to remedy the difficulties in the application and scope of the privilege, and to promote uniformity in the exceptions to the privilege in federal courts.

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6. *Id.* at 1932.

7. FED. R. EVID. 501.

## I. BACKGROUND

"I know that's a secret, for it's whispered every where."<sup>8</sup>

A. *The Treatment of Privileges in General*

Despite the many caveats against the establishment of evidentiary privileges, a number of privileges defined historically and through common law, have survived. These privileges include, but are certainly not limited to, the spousal privilege, the attorney-client privilege, and the trade secret privilege.<sup>9</sup>

The privilege of communications between spouses existed once at common law, but today is mostly established and defined by statute.<sup>10</sup> Many states define spousal privileges such that people may refuse to testify against or withhold testimony of conversations with their spouses.<sup>11</sup> Underlying the spousal privilege are the naturally opposing policies forcing spouses to testify against each other: the preservation of marital security, and the prevention of marital dissention.<sup>12</sup> In 1979, the United States Supreme Court addressed the spousal privilege with its holding in *Trammel v. United States*.<sup>13</sup> *Trammel* modified the spousal privilege to permit witness-spouses the freedom to choose whether to testify against a defendant-spouse without consulting with the defendant-spouse, or even against the defendant-spouse's wishes.<sup>14</sup>

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8. WILLIAM CONGREVE, LOVE FOR LOVE, in 2 THE COMPLETE WORKS OF WILLIAM CONGREVE 80, 126-142 (Montague Summers ed. 1964) (1695).

9. *Upjohn v. United States*, 449 U.S. 383, 389 (1981) (holding the attorney-client privilege valid); see *Trammel v. United States*, 445 U.S. 40, 51-53 (1980) (holding the spousal privilege to be a valid privilege); see, e.g., CAL. EVID. CODE § 1060 (West 1995); NEB. REV. STAT. § 27-508 (1996) (establishing statutory trade secret privileges).

10. See, e.g., CAL. EVID. CODE § 970; GA. CODE ANN. § 24-9-21(2) (1995); Catharina J.H. Dubbelday, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 EMORY L.J. 777, 786 (1985).

11. See, e.g., CAL. EVID. CODE § 970 ("Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding."); COLO. REV. STAT. § 13-90-107(1)(a)(I) (1997) ("A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent."); GA. CODE ANN. § 24-9-21(1) (setting forth examples of policy-based privileges, including that between husband and wife); Dubbelday, *supra* note 10, at 736-89 (explaining the historical developments of the husband-wife privilege).

12. Dubbelday, *supra* note 10, at 786 (citing 8 JOHN H. WIGMORE, EVIDENCE § 2228 (McNaughton rev. ed. 1961)) (stating the policy reasons behind the marital testimonial privilege, including the desire to prevent marital dissention, and the natural repugnance to requiring spouses to testify against each other in court).

13. 445 U.S. 40 (1980).

14. *Id.* at 53.

After *Trammel*, two forms of the privilege against adverse spousal testimony existed. The first was the traditional, statutory form where one spouse may prevent the other from testifying against him,<sup>15</sup> and the second is the *Trammel* form, where the spouse-witness alone may choose whether to testify adversely.<sup>16</sup> Individual states may legislatively limit the spousal privilege. For example, in Illinois, the spousal privilege is further limited by statute in actions between a husband and wife where the custody, support, welfare, or health of their children is at issue.<sup>17</sup>

A second common-law privilege, between an attorney and his client, arose in England during the reign of Elizabeth I.<sup>18</sup> The privilege stemmed from the idea of "gentlemen's honor" where a person's word of honor against revealing the content of conversations or other events relieved him of the duty to testify.<sup>19</sup> Today, the attorney-client privilege no longer springs from a chivalrous code of honor, but rather from policies designed to promote honest, complete, and frank communication,<sup>20</sup> encourage full investigations into facts and issues,<sup>21</sup> and protect the attorney's ability to give uninhibited and solid advice.<sup>22</sup> In criminal cases, this privilege may be important because of the require-

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15. See *supra* notes 10-12 and accompanying text.

16. See *Trammel*, 445 U.S. at 53. A husband may refuse to testify against his wife, but, if he wishes to testify, the wife may not prevent him. *Id.*

17. 735 ILL. COMP. STAT. 5/8-801 (West 1993).

18. Dubbelday, *supra* note 10, at 783 (citing 8 JOHN H. WIGMORE ON EVIDENCE § 2290, at 543) (describing the "point of honor" privilege). This privilege arose shortly after the duty to testify was established as a vital part of the legal system. *Id.* The "point of honor" privilege protected a "gentleman's honor," which gave a person relief from testifying where he gave his word of honor not to testify. *Id.* Eventually, this "point of honor" privilege became too broad to continuously prevail in the courts. *Id.*

19. *Id.*

20. See *Greyhound Corp. v. Superior Court*, 364 P.2d 266, 288 (Cal. 1961) (taking the position that communications made in private between the attorney and his client are intended to be strictly confidential and should be protected within an evidentiary privilege); see generally Gerald Sobel, *The Confidential Communication Element of the Attorney-Client Privilege*, 4 CARDOZO L. REV. 649 (1983) (advocating the theory that full disclosure of all relevant information to an attorney is encouraged and fostered when a client knows and is certain that the information will remain private and will not be used against him in court).

21. 116 S. Ct. at 1929-30 (articulating that a denial of the privilege would chill discussion and thereby prohibit a full investigation of issues).

22. See *United States v. Zolin*, 491 U.S. 554, 562 (1989) (stating that the policies behind the attorney-client privilege are deeply entrenched in historical common law); *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (involving a general counsel's investigation which included questionnaires sent to managers; the Court held that the answers to the questionnaires, as well as the attorney's notes and comments thereon, were protected by the attorney-client privilege); *In re Jaqueline F.*, 391 N.E.2d 967, 969 (N.Y. 1979) (stating that the law encourages full disclosure between attorney and client).

ment of "assistance of counsel for his defense" set forth in the Sixth Amendment of the United States Constitution.<sup>23</sup>

While the spousal and attorney-client privileges emphasize the sanctity of the relationships, other common-law privileges, such as trade secrets and military secrets, are designed to protect economic interests and national security.<sup>24</sup> In *DuPont v. Masland*,<sup>25</sup> the Court determined that the trade-secret privilege prevents a defendant or exempts a witness from revealing or testifying as to the contents of trade secrets or trade processes in court or in depositions.<sup>26</sup> Military secrets are also not disclosable, especially in times of uprising, police action, or war.<sup>27</sup> In *United States v. Reynolds*<sup>28</sup> the Court held that the privilege against testifying about military secrets was embedded in the common-law need for protection of national security and wartime strategy.<sup>29</sup>

United States courts have developed other privileges that are not necessarily based in American common law. For example, the priest-penitent privilege arose from English Common law.<sup>30</sup> Today, it derives from two main concepts. The first concept is the protection of a relationship traditionally espoused in trust and confidence.<sup>31</sup> The second is the patently offensive idea of imprisoning a priest or pastor for following the duties imposed by religious tenets and beliefs.<sup>32</sup> In 1813, the *People v. Phillips*<sup>33</sup> court was the first to recognize the privilege within the United States.<sup>34</sup> Many states, via statutory law, subse-

23. U.S. CONST. amend. VI.

24. See *infra* notes 25-29.

25. 244 U.S. 100 (1917).

26. *Id.* at 103 (stating that a defendant in a suit to prevent the use of a trade secret may be enjoined from disclosing any such secrets to witnesses or experts).

27. See, e.g., *United States v. Reynolds*, 345 U.S. 1 (1953). During wartime, the widows of three deceased civilians moved for production of the Air Force's official investigation reports in relation to an accident which involved secret electronic military equipment. *Id.* at 3. The United States moved to quash the motion, claiming privilege against disclosure pursuant to Air Force regulations. *Id.* at 3-4. The district judge rejected the claim of privilege based on the Tort Claims Act. *Id.* at 4. The Supreme Court ultimately reversed, stating that a fact finder could adduce the facts as to causation without resort to revealing military secrets, and that there was a reasonable danger that the accident reports would contain references to the secret electronic equipment. *Id.* at 10-11.

28. 345 U.S. 1 (1953).

29. *Id.* at 10.

30. Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 96-101 (1983).

31. Dubbelday, *supra* note 10, at 790-91.

32. Yellin, *supra* note 30, at 113.

33. *People v. Phillips* was not officially reported, but was abstracted in 1 W. L.J. 109 (1843-44).

34. 1 W. L.J. at 112-13 (holding that a Catholic priest does not have to disclose what has been confessed to him during the sacrament of Penance).

quently adopted the court's holding in *Phillips*.<sup>35</sup> In some jurisdictions, the priest holds the privilege independently of the penitent.<sup>36</sup> The independent status of the privilege is conditioned upon whether or not breaching the penitent's confidence would go against a tenet of secrecy held by the priest's faith.<sup>37</sup> A recent controversy surrounding the priest-penitent privilege is whether the privilege should extend to the secular counseling activities of the clergy.<sup>38</sup> Some courts have expressly denied this privilege, and others have granted the privilege to secular communications.<sup>39</sup> Those courts granting the privilege have justified it on the grounds of the intent of the parties, and their expectations of confidentiality.<sup>40</sup>

While the courts have been open and expansive in their analysis of issues such as the priest-penitent privilege, they also have refused to acknowledge a number of asserted privileges.<sup>41</sup> Certain privileges, according to the courts, lack support both at common law and under the guides of "reason and experience."<sup>42</sup> For example, the common law did not recognize a physician-patient privilege.<sup>43</sup> Although some federal courts still refuse to recognize the privilege, certain jurisdictions have adopted the physician-patient privilege by statute.<sup>44</sup>

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35. See, e.g., 735 ILL. COMP. STAT. 5/8-803 (West 1993)

[A clergy person] shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body.

*Id.*; see Dubbelday, *supra* note 10, at 777.

36. Yellin, *supra* note 30, at 111-12.

37. *Id.* at 137-38.

38. *Developments in the Law—Privileged Communications II*, 98 HARV. L. REV. 1450, 1471 (1985) [hereinafter *Developments in the Law II*].

39. Compare *Simrin v. Simrin*, 43 Cal. Rptr. 376 (Ct. App. 1965) (declining recognition of a privilege for communications with a rabbi during marital counseling sessions), with *People v. Pecora*, 246 N.E.2d 865 (Ill. App. Ct. 1969) (upholding a privilege during a murder trial for marital counseling communications with clergy).

40. See, e.g., *Kruglikov v. Kruglikov*, 217 N.Y.S.2d 845 (Sup. Ct. 1961) (holding that a clergyman's privilege not to disclose confessions is absolute, and even confidential communications about matters that involve public justice may not be compelled). In *Kruglikov*, the New York Supreme Court held that a marital counseling session held with a Rabbi in the privacy of a his study was privileged, even though neither husband nor wife was a member of the congregation. *Id.* at 846-47.

41. See *infra* notes 43-57 and accompanying text.

42. See *University of Pa. v. EEOC*, 493 U.S. 182, 188-89 (1990) (holding that there is no privilege to withhold peer review materials based on common-law, reason, or experience); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976) (stating that there is no physician-patient privilege based on common law, reason, or experience).

43. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977).

44. Compare *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 506 (7th Cir. 1995) ("[F]ederal common-law does not recognize a physician-patient privilege."), and *United States v. University Hospital*, 575 F. Supp. 607, 611 (E.D.N.Y. 1983) (refusing to recognize a doctor-patient privilege

Besides the physician-patient privilege, courts and legislatures have refused to acknowledge the existence of a string of purported privileges.<sup>45</sup> For example, in *Branzburg v. Hayes*,<sup>46</sup> the Supreme Court held that requiring newspaper reporters to testify as to the identity of their sources and the content of their conversations does not abridge the freedom of press or association under the First Amendment.<sup>47</sup> As a result of this holding, the Court refused to protect by testimonial privilege a reporter's agreement to conceal evidence of his sources' criminal conduct.<sup>48</sup> As with the physician-patient privilege, many jurisdictions, such as Illinois, have permitted a limited reporter's privilege via statutory law.<sup>49</sup> The Supreme Court also refused to grant editors, writers, and publishers involved in the editorial process protection from disclosure of their sources in defamation cases.<sup>50</sup> In doing so, it held that the auspices of the First Amendment do not prevent judicial and fact finding inquiries into their discussions, meetings, and editing sessions.<sup>51</sup>

The courts have similarly struck down the proposition of an accountant's privilege.<sup>52</sup> Under that principle, a tax accountant's client cannot invoke a Fifth Amendment privilege to prevent the production of accountant or client business and tax records in the possession of the accountant.<sup>53</sup> Further, there is no work-product immunity for tax

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in federal courts except "with respect to an element of a claim or defense as to which state law supplies the rule of decision"), with 735 ILL. COMP. STAT. 5/8-802 (West 1995) (providing for a general health care practitioner privilege, which includes physicians, surgeons, psychologists, nurses, mental health workers, therapists, and "other healing art practitioners").

45. See *Herbert v. Lando*, 441 U.S. 153, 169 (1979) (rejecting a privilege for writers and editors that would allow them to keep their sources unknown in defamation cases); *Couch v. United States*, 409 U.S. 322, 335 (1973) (rejecting a privilege that would allow a taxpayer to prevent their attorney from disclosing tax records); see *infra* notes 46-57 and accompanying text.

46. 408 U.S. 665 (1972).

47. *Id.* at 667 (rejecting news gatherer's First Amendment claim of right to refuse to testify before a grand jury about his confidential sources).

48. *Id.* at 692.

49. 735 ILL. COMP. STAT. 5/8-901 (stating that a reporter may not be compelled to reveal the source of any information, except in a libel or slander case, or when a party has filed an application to divest the reporter of the privilege, and the court has so ordered).

50. *Herbert*, 441 U.S. at 172-74.

51. *Id.* (holding that, in a defamation action by a "public figure," in which the plaintiff is required to prove "actual malice," the First Amendment does not bar inquiry into the editorial process as a whole and inquiry into the state of mind of those responsible for the writing, editing, and publishing of the story).

52. *Couch v. United States*, 409 U.S. 322, 335 (1973).

53. See *id.* (holding that, where a taxpayer delivered business and tax records to an accountant, that taxpayer was not entitled to invoke a privilege to prevent the production of her business, personal, and tax records in the sole possession and control of her accountant in connection with an investigation into tax fraud or tax liability).



work papers prepared by an independent accountant when subpoenaed by the IRS.<sup>54</sup>

The Court has also held that neither common law nor reason and experience support a grant of testimonial privilege to state legislators in a federal criminal trial.<sup>55</sup> In rendering its decision, the Court relied on the fact that such a privilege is neither historically based nor recognized at common law.<sup>56</sup> Finally, the Supreme Court refused to grant a privilege to protect academic peer review and tenure review materials in cases involving wrongful discharge or discrimination in the denial of tenure.<sup>57</sup>

Justice Frankfurter warned that privileges ought to be construed strictly.<sup>58</sup> However, many privileges have survived their common law origins<sup>59</sup> and courts continue to develop testimonial privileges through the Federal Rules of Evidence.<sup>60</sup>

### *B. Legislative History of Rule 501 of the Federal Rules of Evidence*

The Federal Rules of Evidence delineate the rules governing the admissibility of evidence in a federal trial. These rules were designed to promote fairness, reduce delay in trials, eliminate waste, and further the ultimate goal of ascertaining truth.<sup>61</sup> Federal Rule of Evidence 501 governs testimonial privilege. Specifically, Rule 501 provides that testimonial privileges will be governed by common law, and interpreted by the courts "in light of reason and experience."<sup>62</sup>

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54. See *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (stating that tax accrual work papers of a taxpayer's accountant are not privileged as work product in an IRS enforcement action).

55. See *United States v. Gillock*, 445 U.S. 360, 374 (1980) (holding that a Tennessee state senator charged with obtaining money under the color of official right did not have a right of privilege in federal criminal prosecutions).

56. *Id.* at 367-68.

57. *University of Pa. v. EEOC*, 493 U.S. 182, 189-99 (1990) (holding that neither common-law privilege nor right of academic freedom under the First Amendment grants a university the right to withhold confidential peer review materials relating to the tenure review process of a former faculty member who claims race and sex discrimination).

58. See *supra* note 3 and accompanying text.

59. See *supra* notes 9-40 and accompanying text.

60. See, e.g., *In re Hampers*, 651 F.2d 19, 22-23 (1st Cir. 1981) (applying the Wigmore test to uphold a qualified privilege for documents relating to the sales tax).

61. FED. R. EVID. 101; *id.* 102. Rule 101 outlines the scope of the rules by stating: "These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges to the extent and with the exceptions stated in Rule 1101." *Id.* 101. Rule 102 outlines the purpose and construction of the rules by stating: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* 102.

62. *Id.* 501. Federal Rules of Evidence 501 reads in pertinent part:

The Supreme Court's first version of article V of the proposed rules,<sup>63</sup> submitted by the Advisory Committee in 1969, contained thirteen separate rules of privilege, and nine of those thirteen rules contained specifically defined privileges, including the psychotherapist-patient privilege.<sup>64</sup>

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Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.

*Id.*

63. Congress gave the Supreme Court power to formally draft and promulgate judicial rules in 1934. *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong. 76 (1974) (testimony of James William Moore, Professor of Law at Yale University). When the Supreme Court turned over drafts of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, Congress neither raised objection nor interfered in the rulemaking process. *Id.* at 76; Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 517 (1994).

64. See 56 F.R.D. 183, at 234-58 (1972). The nine proposed privileges were enumerated as follows: 5.02 Required Reports; 5.03 Attorney-Client; 5.04 Psychotherapist-Patient; 5.05 Spousal; 5.06 Priest-Penitent; 5.07 Political Vote; 5.08 Trade Secrets; 5.09 State Secrets; and 5.10 Informant Identification. *Id.* The Psychotherapist-Patient privilege, Proposed Rule 5.04 stated in pertinent part:

(B) GENERAL RULE OF PRIVILEGE.

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(C) WHO MAY CLAIM THE PRIVILEGE.

The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(D) EXCEPTIONS.

(1) *Proceedings for hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of judge.* If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) *Condition an element of claim or defense.* There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

The Advisory Committee revised its draft of the rules in October of 1970, retaining the nine enumerated rules, but revising and replacing Rule 501.<sup>65</sup> In October of 1971, the Advisory Committee sent the draft rules to the Supreme Court,<sup>66</sup> and in November of 1972 the Court approved the rules and sent them to Congress for approval.<sup>67</sup>

At the congressional hearings, article V's nine privilege provisions of the proposed rules were a hotbed of criticism and debate.<sup>68</sup> One commentator has observed: "Article V dealing with privileges was not only the most controversial part of the proposed rules; in the minds of many, that article was the most important part of the rules."<sup>69</sup>

As Professor Edward J. Imwinkelried pointed out, most rules of evidence govern only what goes on in a courtroom, having little impact or effect on life and conduct in the outside world.<sup>70</sup> However, he emphasized that privilege rules reach beyond the four walls of the courtroom and into everyday, pre-litigation behavior.<sup>71</sup> Imwinkelried further pointed out that where other evidentiary rules deal with the ultimate legal objectives of finding truth and limiting waste, evidentiary rules "promote extrinsic social values."<sup>72</sup> Members of Congress recognized that the rules of privilege are important not only to lawyers and judges, but to the community as a whole.<sup>73</sup>

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*Id.* at 241.

65. S. REP. NO. 93-1277, at 5, 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051.

66. *Id.* at 5.

67. S. REP. NO. 93-1277, at 5. In February of 1973, Chief Justice Burger sent the rules to Congress for approval. *Id.*; see C.J. WARREN BURGER, COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING THE PROPOSED RULES OF EVIDENCE OF THE UNITED STATES COURTS AND MAGISTRATES, H.R. DOC. NO. 93-46, at vi-vii (1973). The Court approved the rules by a vote of 8-1, with Justice Douglas as the only dissenter. *Id.* at vi. Douglas questioned the Supreme Court's power to create and promulgate rules of evidence. *Id.* He suggested that the Federal Rules of Evidence should be developed by Congress and by the courts on a case-by-case basis. *Id.* at vi-vii.

68. Imwinkelried, *supra* note 63, at 518. One criticism was that it was unwise to undermine state interests by making privilege law a purely federal creature. *Id.* Critics argued that if state interests were enough to require the application of state substantive law in federal cases, those interests also required that federal courts apply state evidentiary privileges. *Id.* Another criticism attacked the elimination of traditional privileges. *Id.*

69. *Id.* at 514.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 143-44 (1973) (testimony of Arthur J. Goldberg, former Justice of the United States Supreme Court).

Hearings on the proposed rules took place in a committee of the House of Representatives in February and March of 1973.<sup>74</sup> In June of 1973, the House committee voted to approve a version of article V.<sup>75</sup> In that version, the committee omitted all rules delineating specific privileges and waivers, leaving only Rule 501.<sup>76</sup> Rule 501 was then reworded to a version substantially similar to what Congress finally approved.<sup>77</sup> The House made some minor amendments to the bill, including what is now Federal Rule of Evidence 1102,<sup>78</sup> approved it, and sent it to the Senate.<sup>79</sup> With some minor changes, the Senate Committee on the Judiciary, which held hearings in June of 1974,<sup>80</sup> and the Senate as a whole agreed with the version approved by the House,<sup>81</sup> and in late 1974, the Conference Committee adopted the House version of article V.<sup>82</sup> Ultimately, both chambers of Congress approved the Federal Rules of Evidence, and President Ford signed them into law on January 3, 1975.<sup>83</sup>

The House version of the privilege rules drew controversy because of its policy of rejecting the application of state privilege law in cases brought in federal courts with novel state claims.<sup>84</sup> Many commentators and legal scholars believed that the doctrine of *Erie R.R. Co. v. Tompkins*<sup>85</sup> required that state law be applied to state issues, and federal law should not supplant state substantive law.<sup>86</sup> The Senate committee noted that a subissue of the *Erie* problem arises when a mix of federal and state claims are brought to trial in a federal court.<sup>87</sup> The committee recognized that such a problem would not be entirely avoidable, and that in some cases "two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as

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74. *Id.* at 5-11 (testimony of Bertram L. Podell, Representative in Congress from the State of New York); Imwinkelried, *supra* note 63, at 520.

75. *Proposed Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong. 145-47 (1973); Imwinkelried, *supra* note 63, at 520.

76. Imwinkelried, *supra* note 63, at 520.

77. *Id.* at 521.

78. FED. R. EVID. 1102 states: "Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code." FED. R. EVID. 1102.

79. Imwinkelried, *supra* note 63, at 522.

80. *See supra* note 65 and accompanying text.

81. Imwinkelried, *supra* note 63, at 523.

82. H.R. CONF. REP. NO. 93-1597, at 1 (1974); *see* Imwinkelried, *supra* note 63, at 523.

83. Act of Jan 3, 1975, Pub. L. No. 93-594, 88 Stat. 1926 (1974).

84. S. REP. NO. 93-1277, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051.

85. 304 U.S. 64 (1938).

86. Imwinkelried, *supra* note 63, at 520-21.

87. S. REP. NO. 93-1277, at 7.

to one but not the other.”<sup>88</sup> The Senate committee’s version adopted a guideline for the application of state or federal privileges.<sup>89</sup> Generally, in criminal and civil federal question cases, federally evolved rules on privilege should apply.<sup>90</sup> Conversely, in diversity cases brought substantially under state law, the state rules of privilege should apply.<sup>91</sup> Because Congress as a whole adopted the House version of Rule 501, these guidelines were not included in the final rule.<sup>92</sup>

The law of evidentiary privileges is not frozen, but has been given flexibility by the legislature and the courts alike.<sup>93</sup> However, Rule 501 has failed to give courts much direction on the parameters of privileges, and as a result, has forced courts to look to outside sources for guidance.<sup>94</sup>

### C. Other Approaches to Privilege Law

Apart from statutory law, a number of theoretical approaches to privilege law have developed.<sup>95</sup> This Note discusses two of them. The first, the Wigmore test, was derived from Professor John H. Wigmore’s criticism of and concern about the easy proliferation of evidentiary privileges.<sup>96</sup> The second theoretical approach, developed by Professor Imwinkelried, compares two approaches by the courts: the restrictive thesis, and the expansive antithesis.<sup>97</sup>

#### 1. The Wigmore Test

A complete exploration of evidentiary privileges requires at least some discussion of Professor Wigmore’s test. Wigmore was one of the toughest critics of evidentiary privileges. He was primarily concerned with the unrestrained manner in which courts applied privilege law.<sup>98</sup>

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88. *Id.* at 12.

89. *Id.*

90. *Id.*

91. *Id.*

92. CONFERENCE COMMITTEE, FEDERAL RULES OF EVIDENCE, H.R. CONF. REP. NO. 93-1597, at 1 (1974); see Imwinkelried, *supra* note 63, at 523.

93. S. REP. NO. 93-1277, at 1; H.R. REP. NO. 93-650, at 8-9 (1973); 120 CONG. REC. 40,891 (1974); see *University of Pa. v. EEOC*, 493 U.S. 182 (1990); *Trammel v. United States*, 445 U.S. 40, 47 (1980).

94. Imwinkelried, *supra* note 63, at 522.

95. See *infra* notes 96-97.

96. See *infra* Part I.C.1.

97. Imwinkelried, *supra* note 63, at 541-42; see *infra* Part I.C.2. Imwinkelried compared the more restrictive approach taken by certain courts (“thesis”), against the more expansive, pre-code approach taken by other courts (“antithesis”), and determined that both are correct, and that today’s courts must take a median approach to constructing and creating new privileges. Imwinkelried, *supra* note 63, at 542.

98. *Developments in the Law II*, *supra* note 38, at 1473.

His traditional theory on the establishment of privileges was formed from that concern.<sup>99</sup> His test derived from that theory applies four universally accepted conditions.<sup>100</sup> The test focuses on an equitable balance of societal, individual, and legal interests.<sup>101</sup> According to Wigmore's test, all four of the following conditions must be met before a court or legislature should recognize a relationship and the conversations therein as privileged:<sup>102</sup>

1. The conversations must originate from a setting which promotes and relies upon the confidence that the content of any conversations therein will remain private;
2. the confidentiality must be essential to the complete maintenance and function of the relationship;
3. the community must have the opinion that the fruits of the relationship receive protection from compelled disclosure; and
4. the injury that would occur from disclosure must be greater than the benefit gained for evidentiary purposes.<sup>103</sup>

According to Wigmore, a negative answer to any of the four criteria means that the privilege in question is unjustified.<sup>104</sup> In his treatise, Wigmore evaluated a number of evidentiary privileges, including attorney-client, priest-penitent, and physician-patient.<sup>105</sup> A number of courts have been influenced by or relied upon the Wigmore test to uphold or dismiss various claims of privilege.<sup>106</sup>

99. Wigmore was the author of a major treatise on evidence, and as such, he was compelled to justify existing privileges. *Id.* at 1472. However, he was a strong believer in the duty to testify. *Id.* Therefore, in his treatise, he tried to constrict privileges as much as possible. *Id.* His approach to privilege law is flexible enough to rationalize the existence of traditional privileges, yet it is strict enough to generally disfavor new ones. *Id.* at 1472-73.

100. 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2285, at 527 (McNaughton rev. ed. 1961).

101. WIGMORE, *supra* note 100, § 2285, at 527-28; see Catherine M. Baytion, Note and Comment, *Toward Uniform Application of a Federal Psychotherapist-Patient Privilege*, 70 WASH. L. REV. 153, 156 (1995).

102. WIGMORE, *supra* note 100, § 2285, at 527.

103. *Id.*; see Baytion, *supra* note 101, at 156.

104. WIGMORE, *supra* note 100, § 2285, at 529; see Brian Domb, *I Shot the Sheriff, but Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & HEALTH 209 213-14 (1991).

105. WIGMORE, *supra* note 100, § 2285, at 528; see Domb, *supra* note 104, at 213.

106. See, e.g., *In re Hampers*, 651 F.2d 19, 22-23 (1st Cir. 1981) (applying the Wigmore test to uphold a qualified privilege for documents relating to the sales tax); *ACLU v. Finch*, 638 F.2d 1336, 1344-45 (5th Cir. 1981) (applying the Wigmore test to deny extension of a privilege against production in federal court to files of a state sovereignty commission); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1100-02 (5th Cir. 1970) (adopting the Wigmore test of the conditions for recognition of a testimonial privilege); *In re Matter of D.D.S.*, 869 P.2d 160, 164 (Alaska 1964) (holding that an alcohol treatment privilege does not apply in matters of child abuse because it fails the fourth prong of the Wigmore test); *State v. Post*, 826 P.2d 172, 181 (Wash 1992), *amended by* 837 P.2d 599 (Wash. 1992) (supporting a privilege for confidential communications by citing the first criterion of the Wigmore test).

## 2. *Imwinkelried's Thesis and Antithesis*

The courts are responsible for developing the law per changes in society and evolving norms.<sup>107</sup> The extent to which courts should take that responsibility has caused strident debate, and, according to Professor Imwinkelried, is subject to two conflicting theses: the restrictive thesis and the expansive antithesis.<sup>108</sup>

Some courts take a restrictive reading of Rule 501, one that precludes or discourages the creation of new privileges.<sup>109</sup> Under this "restrictive thesis," the courts are precluded from creating or recognizing any privilege that did not exist at common law before the adoption of the Federal Rules.<sup>110</sup> According to Rule 501, "the principles of common law" govern the federal privilege rules.<sup>111</sup> If "principle" is interpreted to mean "rules," according to Imwinkelried, then Rule 501 can only be interpreted to mean that courts cannot recognize any privileges other than those established before Rule 501, and recognized at early common law.<sup>112</sup> As a subset of the restrictive thesis, Imwinkelried discussed the view that, if courts are not restricted to the common law in creating new privileges, then they are at least discouraged from doing so.<sup>113</sup> This view espouses the position that Rule 501 "erects a strong presumption against the creation of novel privileges."<sup>114</sup>

On the other hand, there is a view held by many courts that preserves the court's common-law, pre-code power to expand upon privileges.<sup>115</sup> According to Imwinkelried, this expansive view takes two forms. The first is that the courts should be more open to novel and different claims of privilege than they were at common law and before the passage of the Federal Rules.<sup>116</sup> This view, unlike the restrictive thesis, is bolstered somewhat by Supreme Court case law<sup>117</sup> and the

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107. Imwinkelried, *supra* note 63, at 524-42.

108. *Id.*

109. *Id.* at 528.

110. *Id.*

111. *Id.* at 527.

112. *Id.* at 528.

113. *Id.*

114. *Id.*

115. *Id.* at 529.

116. *Id.* at 530.

117. See, e.g., *United States v. Gillock*, 445 U.S. 360, 367 (1980) (holding that where the enforcement of federal criminal statutes is at stake, the search for truth is paramount, even though the denial of a testimonial privilege may have some impact upon a legislator's ability to exercise his legislative function); *Trammel v. United States*, 445 U.S. 40, 51-53 (1980) (holding that the witness-spouse alone has the privilege to refuse to testify against his spouse, and the witness may neither be compelled to testify or foreclosed from testifying).

legislative history of article V of the Federal Rules of Evidence.<sup>118</sup> The second view is that Rule 501 gives the courts the same broad and open freedom to create new privileges as they had before the Federal Rules.<sup>119</sup>

After a review and discussion of both theses, Imwinkelried stated that the proponents of both the expansive and restrictive views are each partially correct.<sup>120</sup> Under the expansive view, Rule 501 does not prevent courts from recognizing novel or new privileges.<sup>121</sup> On the other hand, under the restrictive view, the courts should not be free to arbitrarily create and recognize new privileges with the same freedom as under the nineteenth-century common law.<sup>122</sup>

#### D. *The Psychotherapist-Patient Privilege*

Psychotherapy is the treatment of mental or emotional disease or disorder by the process of verbal, symbolic, or associative communication between the patient and the therapist.<sup>123</sup> A therapist will often accompany therapy with a regimen of medications if so licensed, but most often verbal psychotherapy is used as the sole method of treatment.<sup>124</sup> According to Professors Elizabeth F. Loftus, John R. Paddock, and Thomas F. Guernsey, effective psychotherapy:

- (1) Does not pathologize or conceptualize patients as diseased, and instead reflects a *collaborative relationship with a therapist* that helps one 'make sense of' his or her gallant attempt to adapt to previous life experience as well as their genetic 'hardware';
- (2) [t]eaches people new ways to construe past, current, and future experiences, so they can live a richer, more rewarding and effective life;
- (3) [h]elps patients learn new thought patterns, behaviors, ways to appropriately regulate emotional expression, and responses to changes in relationships or predictable life transitions (e.g. birth of a child, death of a parent) based on well developed theory supported by empirical data; [and]
- (4) [a]ccomplishes these objectives *in the context of an empathetic and genuinely caring relationship with the therapist*.<sup>125</sup>

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118. See *supra* notes 61-94 and accompanying text.

119. Imwinkelried, *supra* note 63, at 535.

120. *Id.* at 542.

121. *Id.*

122. *Id.*

123. JONATHAN KOVAL, A COMPLETE GUIDE TO THERAPY 264 (1976).

124. *Id.*

125. Elizabeth F. Loftus, et al., *Patient-Psychotherapist Privilege: Access to Clinical Records in the Tangled Web of Repressed Memory Litigation*, 30 U. RICH. L. REV. 109, 144-59 (1996) (emphasis added).



As shown, the psychotherapist-patient relationship is one that requires a two-way open communication to function properly.<sup>126</sup> Often, as stated by Professors Loftus, Paddock, and Guernsey, the verbal, associative, and symbolic definition of psychotherapy may require that the therapist and his patient develop a caring, deep, trusting, and emotional relationship.<sup>127</sup>

### 1. *Defining the Professional*

Psychotherapy itself is relatively easy to define. The exact legal definition of a psychotherapist, however, proves to be rockier terrain. There are three major approaches used in defining exactly who a psychotherapist is, and to whom the psychotherapist-patient privilege should apply: the credential, function, and judicial approaches.<sup>128</sup>

Lawmakers and courts using the credential approach focus on the individual's credentials, licensing, education, and certification.<sup>129</sup> Many jurisdictions require that a professional be licensed or certified in some manner or another in order to fall within the privilege statute.<sup>130</sup> For example, Illinois defines a licensed clinical social worker as one whose credentials include a "masters degree in social work from an approved program, and 3,000 hours of satisfactory supervised clinical professional experience."<sup>131</sup> The statute further states that licensed social worker's training consists of either a "degree from a graduate program of social work, approved by the state . . . [or] a degree in social work from an undergraduate program approved by the State . . . [in addition to] three years of supervised professional experience."<sup>132</sup> According to Catharina J.H. Dubbelday, the difficulty in this approach is how and when to extend the privilege to "counselors."<sup>133</sup> Counseling, as a profession, is relatively new and as yet unregulated. In many states the profession is neither recognized nor privileged.<sup>134</sup>

Under the functional approach, courts and legislatures do not define the therapist or delineate the privilege by the individual's creden-

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126. *Id.*

127. *Id.*

128. See Dubbelday, *supra* note 10, at 813-21.

129. *Id.* at 813.

130. See, e.g., COLO. REV. STAT. § 13-90-107(g) (1973) (extending the privilege only to "certified psychologists"); IDAHO CODE § 54-2314 (1979) (limiting the privilege to "a person licensed as a psychologist").

131. 225 ILL. COMP. STAT. 20/9 (West 1994).

132. *Id.* 20/9A.

133. Dubbelday, *supra* note 10, at 813.

134. *Id.* at 816.

tials, but by the action being performed, and the function and role the therapist plays.<sup>135</sup> The use of this approach relies on what the individual does, not who the individual is.<sup>136</sup> Using Illinois again as an example, the function of a "licensed social worker . . . includes social services to individuals, groups, or communities in any one or more of the fields of social casework, social group work, community organization for social welfare administration or social work education."<sup>137</sup> Illinois further follows the functional approach in granting privileges to "personal counseling victims of violent crimes."<sup>138</sup> This statute, however, does not define the role of the counselor. Rather, the statute defines the victim and the 'violent crimes' to be covered,<sup>139</sup> and extends the privilege to "any counselor, employee, or volunteer of a victim aid organization" who assists such a victim.<sup>140</sup> Another example of the functional approach is demonstrated by a Pennsylvania law which allows a communications privilege to individuals who perform the functions of rape crisis counselors, regardless if they are accredited or formally educated.<sup>141</sup>

The third approach, the judicial discretion approach, allows the judicial branch the discretion to define the psychotherapist and thereby create, interpret, and apply the statutory law and common-law privileges.<sup>142</sup> Rule 501 has been interpreted to advocate this approach, which gives the judiciary the right to apply "reason and experience" to interpret privileges.<sup>143</sup>

## 2. *Theoretical Justifications Supporting the Privilege*

Because Federal Rule of Evidence 501 does not specifically delineate a psychotherapist-patient privilege, once a federal court decides how to define the psychotherapist, it may look to theory or policy to determine whether the privilege should apply. There are a number of theoretical justifications for the establishment of a psychotherapist-patient privilege.

135. *Id.* at 817.

136. *Id.*

137. 225 ILL. COMP. STAT. 20/3(9).

138. 735 ILL. COMP. STAT. 5/8-802.2 (West 1993).

139. *Id.* (defining "violent crimes" as "any felony in which force or threat of force was used against the victim or any misdemeanor which results in death or great bodily harm to the victim").

140. *Id.* 5/8-802.2(c).

141. 42 PA. CONS. STAT. § 5945.1(a) (1982).

142. Dubbelday, *supra* note 10, at 820; Barry K. Green, Comment, *The Psychotherapist-Patient Privilege in Texas*, 18 HOUS. L. REV. 137, 154-56 (1980).

143. *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 379 (3rd Cir. 1976).

### a. Traditional Utilitarianism

The traditional utilitarian justification balances society's interests and the patient's interests.<sup>144</sup> The utilitarian justification emphasizes that the privilege promotes frank and open disclosure and promotes an atmosphere of confidence and trust between the psychotherapist and her patient, which are absolutely essential for effective and proper treatment.<sup>145</sup> The lack of a privilege has been said to have a "chilling effect" upon the frank and open discussion.<sup>146</sup>

The traditional utilitarian reasoning also focuses on the abstract nature and various methods of psychotherapy.<sup>147</sup> Because psychotherapy is such a subjective process, much of the information conveyed to the therapist may be inaccurate and unreliable as evidence in a court of law.<sup>148</sup>

### b. Right of Personal Privacy

An alternative justification for the psychotherapist-patient privilege supports the patient's right to protect his or her privacy interests.<sup>149</sup> A number of common law and statutory regulations have the right of privacy at their core.<sup>150</sup>

In addition to common law and state statutes, the Constitution provides a certain degree of protection for an individual's right to privacy.<sup>151</sup> For example, the courts recognize the need for control over the distribution of private information.<sup>152</sup> The Fourth Amendment, on the other hand, protects privacy interests against unreasonable search and seizure.<sup>153</sup> The Supreme Court has also recognized a Constitutional right for individuals in freedom from governmental intrusion in making critical decisions concerning marriage, birth and procreation, family matters, child rearing, and education.<sup>154</sup> There is

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144. *Developments in the Law—Privileged Communications IV*, 98 HARV. L. REV. 1530, 1531 (1985) (hereinafter *Developments in the Law IV*).

145. Sigmund Freud, *An Outline of Psycho-Analysis*, in 23 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, 144, 174 (1964).

146. *Developments in the Law II*, *supra* note 38, at 1476.

147. *Id.* at 1472.

148. Dubbelday, *supra* note 10, at 801-03.

149. *Developments in the Law II*, *supra* note 38, at 1472.

150. The right of privacy supports some forms of tort liability. *See, e.g.*, The Privacy Act of 1974, 5 U.S.C. § 552a (1994); The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1994). *Developments in the Law IV*, *supra* note 144, at 1544-45.

151. *Developments in the Law IV*, *supra* note 144, at 1545-48.

152. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977).

153. U.S. CONST. amend IV; *see Katz v. United States*, 389 U.S. 347, 351 (1967).

154. *See, e.g., Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (holding that the decision to have an abortion is within the constitutionally protected area of privacy); *Griswold v. Connecticut*, 381

also a privacy interest in an individual's bodily integrity.<sup>155</sup> Likewise, the psychotherapist-patient privilege has been justified on constitutional privacy grounds.<sup>156</sup>

### 3. *Theoretical Arguments Against the Privilege*

There are also a number of persuasive arguments against the psychotherapist-patient privilege. First and foremost, the state has an inherent interest in the maintenance of important evidence, and the presentation of that evidence to a jury.<sup>157</sup> Unlike the discovery aspect of attorney-client privilege, replication of psychotherapy notes and conversations through other forms of discovery is not feasible, and, although the prosecution has a right to conduct its own examination, such examinations may not be an adequate substitute for sessions that are neither custodial nor pressured.<sup>158</sup>

Furthermore, loss of information that is essential and relevant may be too high a price to pay to avoid an invasion of the privacy of a psychotherapist-patient relationship, where there is at the same time an equal or greater intrusion into a person's private life—that of public accusation and public trial.<sup>159</sup> The critics of the privilege argue that the absence of the privilege does not deter or delay therapy because, for the most part, patients are unaware of its existence.<sup>160</sup> One study has shown that the actions of many of the state legislatures in codifying the privilege had little or no effect on the success or the failure of therapy.<sup>161</sup>

Many courts and legislatures have weighed both the pros and cons of the psychotherapist-patient privilege with mixed results. Although courts in two cases, *Allred v. State*,<sup>162</sup> and *Binder v. Ruvel*,<sup>163</sup> found a

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U.S. 479, 485 (1965) (stating that the use of contraceptives in a marital relationship is protected by the Constitution); *Pierce v. Society of Sisters*, 268 U.S. 510, 573-74 (1925) (holding that parents have a constitutional right to determine the educational path of their own children).

155. See, e.g., *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (holding that the Fourteenth Amendment's guarantee of due process is violated when a suspect's stomach is forcibly pumped).

156. *Developments in the Law IV*, *supra* note 144, at 1545-48.

157. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

158. *Domb*, *supra* note 104, at 213.

159. Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 624 (1980).

160. Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 894-95 (1982).

161. *Id.* at 895-96.

162. 554 P.2d 411 (Alaska 1976).

163. No. 52 C 2535 (Cir. Ct. Cook. Cty. Ill. June, 1952); see also Robert M. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 639 (1964).

psychotherapist-patient privilege inherent in common law, states for the most part have developed the psychotherapist-patient privilege through state statutory law.<sup>164</sup>

#### 4. *State Statutory Law*

Although all fifty states recognize some form of a psychotherapist-patient privilege, the states differ on such issues as the limits and scope of the privilege.<sup>165</sup> Eleven states equate the psychotherapist-patient privilege with the attorney-client privilege, and give it the same status.<sup>166</sup> Five states merely recognize the privilege without limiting or defining conditions.<sup>167</sup> Five other states recognize the privilege with minor reforms or limitations.<sup>168</sup> Twenty-one states follow the pattern of Proposed Federal Rule of Evidence 5.04, limiting the privilege to a number of the exceptions.<sup>169</sup> Four states incorporate

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164. Anne D. Lamkin, *Recent Development: Evidentiary Privileges, Should Psychotherapist-Patient Privilege be Recognized?*, 18 AM. J. TRIAL ADVOC. 721, 723-25 (1995) (citing the following statutes in support: ARIZ. REV. STAT. ANN. § 32-2085 (West 1983); ARK. CODE ANN. § 17-97-105 (Michie 1987); CAL. EVID. CODE § 1014 (West 1994); KY. REV. STAT. ANN. § 319.110 (Banks-Baldwin 1953); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1993); OHIO REV. CODE ANN. § 4732.19 (Anderson 1993); 42 PA. CONS. STAT. ANN. § 5944 (West 1994); S.C. CODE ANN. § 40-75-160 (Law. Co-Op. 1991)).

165. *Id.*

166. *Id.* at 723-24 (citing the following statutes in support: ALA. CODE § 34-26-2 (1991); ARIZ. REV. STAT. § 32-2085 (1992); GA. CODE ANN. § 43-39-16 (1994); IDAHO CODE § 54-2314 (1994); KAN. STAT. ANN. § 74-5323 (1992); MONT. CODE ANN. § 26-1-807 (1993); N.J. STAT. ANN. § 45:14B-28 (West 1978); N.Y. C.P.L.R. 4507 (McKinney 1992); OHIO REV. CODE ANN. § 4732.19 (Anderson 1991); 42 PA. CONS. STAT. § 5944 (West 1982); WASH. REV. CODE § 18.83.110 (1989)).

167. *Id.* at 724 (citing the following statutes in support: KY. REV. STAT. ANN. §§ 421.215, 422A.0507 (Banks-Baldwin 1988) (psychotherapist-patient relationship only); MINN. STAT. § 595.02(g) (1988); MISS. CODE ANN. § 73-31-29 (1989); MO. REV. STAT. § 337.055 (1989); S.D. CODIFIED LAWS § 19-13-7 (Michie 1987)).

168. *Id.* (citing the following statutes in support: COLO. REV. STAT. ANN. § 13-90-107(g) (West 1989) (limiting itself to information gleaned while patient is in therapy); N.H. REV. STAT. ANN. § 330-A:19 (1984) (limiting the terms of necessity in court proceedings); N.C. GEN. STAT. § 8-53.3 (1987) (recognizing the privilege except in cases of child abuse and where "disclosure is necessary to a proper administration of justice"); UTAH CODE ANN. § 58-61-602 (1994); VA. CODE ANN. § 801-400.2 (Michie 1992) (allowing for a court's discretion, and allowing the privilege in civil actions only)).

169. *Id.* (citing the following statutes in support: ALASKA STAT. § 08.86.200(a) (Michie 1991); ARK. CODE ANN. § 17-96-105 (Michie 1992); CAL. EVID. CODE §§ 1010-1026 (West 1996); CONN. GEN. STAT. §§ 52-146(c) to 52-145(o) (1991); DEL. R. EVID. 503 (1991); D.C. CODE ANN. § 14-307 (1989); FLA. STAT. ANN. § 90.503 (West 1979); HAW. REV. STAT. § 33-626, Rule 504.1 (1985); IND. CODE § 25-33-1-17 (Michie 1995); ME. R. EVID. 503 (1994); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1989); MASS. GEN. LAWS ch. 233, § 20B (1995); MICH. COMP. LAWS § 330.1750 (1992); N.M. STAT. ANN. § 11-504 (Michie 1994); N.D. R. EVID. 503 (1994); OKLA. STAT. tit. 12, § 2503 (1993); OR. REV. STAT. § 40.230 (1988); R.I. GEN. LAWS §§ 5-37.3-4 (1987); WIS. STAT. § 905.04 (1993); WYO. STAT. ANN. § 33-27-103 (Michie 1994)); *see* 735 ILL. COMP. STAT. 5/8-802 (West 1995).

the psychotherapist-patient privilege in statutes which set forth privileges for physicians or mental health professionals in general.<sup>170</sup> Four states explicitly recognize a privilege for psychiatrists, but neither recognize nor provide a privilege for psychologists, social workers, or psychotherapists.<sup>171</sup> Finally, one state, Texas, recognizes a physician-patient privilege without specific provision for psychiatrists or psychologists.<sup>172</sup>

### 5. *Exceptions to the Privilege*

A number of common-law and statutory exceptions to the psychotherapist-patient privilege have been created,<sup>173</sup> where the need for information or testimony far outweighs the benefits of confidentiality.<sup>174</sup> For example, if the patient has made explicit threats of violence against another during his therapy session, the psychotherapist has a duty to warn the potential victim of the threatened violence.<sup>175</sup> Thus, the relationship which creates the need for protection and confidentiality also creates the duty to warn.<sup>176</sup> Recently, that duty to warn has been expanded to include situations where the patient merely threatened property damage.<sup>177</sup> The psychotherapist's duty to warn

170. Lamkin, *supra* note 164, at 724 (citing the following statutes in support: IOWA CODE ANN. § 622.10 (West 1994 & Supp. 1994) (including a psychotherapist under the definition of a mental health professional); LA. REV. STAT. ANN. § 13:3734 (West 1991) (including a psychotherapist under the definition of a health care provider); NEB. REV. STAT. § 27-504 (1989) (including the treatment of emotional and mental conditions under a physician-patient privilege); NEV. REV. STAT. ANN. §§ 49.215 to 49.265 (Michie 1986) (including a psychologist in the physician-patient privilege)).

171. *Id.* (citing the following statutes in support: S.C. CODE ANN. § 44-115-10 (Law. Co-op. 1993) (recognizing an overall privilege for patient records); TENN. CODE ANN. § 24-1-207 (1994) (recognizing a psychiatrist-patient privilege limited to when the mental condition is at issue); VT. STAT. ANN. tit. 12, § 1612 (1994) (establishing a privilege for medical personnel or mental health professionals); W. VA. CODE § 30-31-13 (1993) (providing for a licensed professional counselor privilege)).

172. *Id.* (citing the following statute in support: TEX. CIV. CODE ANN. 4495b, § 5.08 (West Supp. 1994) (addressing a physician-patient privilege only)).

173. Bayton, *supra* note 101, at 167-74 (discussing various exceptions including exceptions for court-ordered examinations).

174. Domb, *supra* note 104, at 215.

175. *See, e.g., Mendendez v. Superior Court*, 834 P.2d 786, 794 (Cal. 1992) (holding that the "dangerous patient" exception to the psychotherapist patient-privilege applies where a psychotherapist has reason to believe that his patient is a danger to himself directly and to other persons, and that disclosure to the two persons is necessary to prevent harm); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 334-44 (Cal. 1976) (holding that when a psychotherapist determines that his patient presents a danger to another individual, he has an affirmative duty to use reasonable care to protect the intended victim, including warning the intended victim of the patient's intentions).

176. *See, e.g., Mendendez*, 834 P.2d. at 786; *Tarasoff*, 551 P.2d at 343.

177. The Vermont courts have explored the duty to warn against the threat of property damage. *See, e.g., Peck v. Counseling Service*, 499 A.2d. 422, 425-26 (Vt. 1985) (dealing with a pa-

arises out of tort law, joining other duty relationships such as hospital-patient, school-pupil, business invitees, host-guest, and jailor-prisoner.<sup>178</sup> One criticism of the dangerous patient exception is that during therapy sessions, patients may commonly make threatening statements which would lead their therapists to disclose those statements for fear of liability and to prevent imminent harm.<sup>179</sup> Some courts fear that the exception could be applied so often and so broadly that the privilege itself could be destroyed.<sup>180</sup> Despite the courts' fears, the duty and exception have the great benefit of protecting persons from imminent and violent harm threatened by patients.

The duty to warn also shapes the child-abuse exception to the privilege.<sup>181</sup> All fifty states reject privilege in situations arising out of threats or instances of child abuse revealed during therapy sessions.<sup>182</sup> Further, where child abuse is at issue or involved in the evidentiary matters, a psychotherapist may not withhold discussions with the patient concerning that abuse.<sup>183</sup>

There is an exception for a patient-litigant relationship arising where the mental health condition is an element of the claim or the defense.<sup>184</sup> There is no privilege when mental health is an element of a claim or defense.<sup>185</sup> In other words, if the claimant put his mental condition into issue, he has waived the privilege.<sup>186</sup> If the court orders a psychological examination, the results thereof cannot be withheld

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tient's explicit threat to burn down his father's barn). On the other hand, in California, the duty to disclose centers on the risk of harm to persons. See, e.g., *Tarasoff*, 551 P.2d at 343-44 (articulating that there is a duty to disclose when the "patient's condition or medication renders certain conduct, such as driving a car, dangerous to others").

178. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 324 (4th ed. 1971).

179. Baytion, *supra* note 101, at 170.

180. *Id.*; see also *People v. Memro*, 700 P.2d 446, 479-80 (Cal. 1985) (Grodin, J., concurring and dissenting) (stating that the majority, in effect, sanctions the "wholesale invasion of privacy" by its failure to define a test or a threshold before invoking the exception for dangerous patients).

181. Baytion, *supra* note 101, at 171-72.

182. See, e.g., CAL. EVID. CODE § 1027 (West 1996) (stating that there is no privilege for therapists if the patient is a child under 16 years of age, the therapist has reason to believe that the child has been the victim of a crime, and that the disclosure is in the best interests of the child); GA. CODE ANN. § 19-7-5 (1996) (listing licensed psychologists and psychology interns among the persons who have the responsibility of reporting instances of child abuse).

183. See, e.g., *Everett v. State*, 572 So. 2d 838, 840 (Miss. 1990) (permitting disclosure of communications between defendant, and his therapist, where the defendant told his therapist that he felt remorse for sexually abusing his stepchild, based on a finding that the communications were not confidential).

184. *Peisach v. Antuna*, 539 So. 2d 544, 546 (Fla. Dist. Ct. App. 1989) (finding that the mental condition of both parents were at issue in a suit for child custody).

185. *Id.*

186. *Dubbelday*, *supra* note 10, at 781 (citing *In re Lifschutz*, 467 P.2d 557 (Cal. 1970)).

from evidence.<sup>187</sup> Finally, communications relevant to hospitalization proceedings are not privileged if the psychotherapist has determined, during the course of treatment, that the claimant is in need of hospitalization.<sup>188</sup>

### E. Appellate Court Treatment

Prior to the Supreme Court's decision in *Jaffee v. Redmond*,<sup>189</sup> the circuit courts of appeals were split over whether or not a psychotherapist privilege should exist at the federal level.<sup>190</sup> The Second and Sixth Circuits previously affirmed the need for such a privilege.<sup>191</sup> The Fifth, Ninth, Tenth, and Eleventh Circuits all refused to acknowledge the privilege.<sup>192</sup> The *Jaffee* decision represents the first time the Seventh Circuit addressed the issue, and recognized the need for a new privilege.<sup>193</sup> The Supreme Court affirmed the opinion of the Seventh Circuit and itself recognized the need for a psychotherapist-patient privilege.<sup>194</sup>

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187. *Massey v. State*, 177 S.E.2d 79, 81 (Ga. 1970).

188. *Domb*, *supra* note 104, at 232.

189. 116 S. Ct. 1923 (1996).

190. *Id.* at 1931.

191. See *In re Doe*, 964 F.2d 1325, 1328-29 (2d Cir. 1992) (recognizing the psychotherapist-patient privilege but, holding that, as violative of the Confrontation Clause, the psychotherapist-patient privilege did not shield a government witness from answering questions about his mental health history when he was the individual who pressed charges in a criminal case, was a witness whose credibility was a central issue at trial, and whose long history of mental illness was relevant to his credibility); *In re Zuniga*, 714 F.2d 632, 639-40 (6th Cir. 1983) (recognizing the necessity for a psychotherapist-patient privilege but holding that the privilege does not protect the identity of a patient or the fact and time of his treatment).

192. See *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir. 1994) (addressing the existence of the privilege only in the context of a criminal child sexual abuse case and holding that the defendant's psychotherapist was required to testify as to the defendant's admissions of child sexual abuse, and his diagnosis as a pedophile because the public interest in protection of young children far outweighed the defendant's privacy); *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989) (emphasizing that a target of a grand jury investigation may not invoke a Fifth Amendment privilege as to her psychiatric records, and stating that it is not the place of the courts to define evidentiary privileges); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988) (refusing to find a psychotherapist-patient privilege in a firearms and narcotics case); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976) (rejecting the defendant's assertion of a privilege in letters to his psychiatrist before and after a bank robbery).

193. *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995) (agreeing with the Sixth and Second Circuits that the establishment and recognition of a psychotherapist-patient privilege is compelled by "reason and experience").

194. *Jaffee*, 116 S. Ct. at 1923.



II. SUBJECT OPINION: *JAFFEE V. REDMOND*

*But that I am forbid  
to tell the secrets of my prison-house,  
I could a tale unfold whose lightest word  
Would harrow up thy soul; freeze thy young blood;  
Make thy two eyes, like stars, start from their spheres . . .*<sup>195</sup>

A. *Facts*

Mary Lu Redmond, a police officer from the Village of Hoffman Estates, Illinois, "was the first officer to respond to a 'fight in progress' call at an apartment complex."<sup>196</sup> When she arrived, two women ran to her squad car, yelling that there had been a stabbing.<sup>197</sup> The record revealed that Redmond testified at trial that she relayed this information to her dispatcher and requested an ambulance.<sup>198</sup> Upon exiting her car, Redmond saw several men run out of the apartment building, one brandishing a pipe.<sup>199</sup> As a result, Redmond drew her service revolver.<sup>200</sup> Two other men ran out of the building.<sup>201</sup> One, Ricky Allen, was chasing the other and threatening him with a butcher knife.<sup>202</sup> Allen ignored Redmond's orders to drop the knife, and Redmond shot Allen when she believed he was about to stab the other man.<sup>203</sup> Allen died of a gunshot wound to his head.<sup>204</sup> Redmond left the police force shortly after the incident.<sup>205</sup>

Carrie Jaffee, as administrator of the estate of Ricky Allen, filed suit under 42 U.S.C. Section 1983,<sup>206</sup> and under the Illinois wrongful death statute,<sup>207</sup> alleging that Redmond unconstitutionally used deadly

195. WILLIAM SHAKESPEARE, *HAMLET* act I, sc. 5.

196. *Jaffee*, 116 S. Ct. at 1925.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1925-26.

204. *Jaffee v. Redmond*, 51 F.3d 1346, 1350 (7th Cir. 1995).

205. *Id.* at 1925 n.1.

206. 42 U.S.C. § 1983 (1994). Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

207. 740 ILL. COMP. STAT. 180/1 (West 1994).

force.<sup>208</sup> During pre-trial discovery of this civil action, Jaffee's counsel learned that Redmond had a number of therapy sessions with a clinical social worker named Karen Beyer.<sup>209</sup> Karen Beyer was certified by the State of Illinois as an employee assistance counselor, and worked for the Village of Hoffman Estates.<sup>210</sup> Redmond first met with Beyer three or four days after the shooting incident, and then met with her two to three times a week for a period of about six months after the shooting.<sup>211</sup>

During the discovery phase, Jaffee requested access to Beyer's notes of her counseling sessions with Redmond for use in cross-examining Redmond at trial.<sup>212</sup> Jaffee's counsel also attempted to depose both Beyer and Redmond as to the content of their conversations.<sup>213</sup> Beyer and Redmond refused to comply with either the request for production or the depositions, asserting that the material and content of their conversations was privileged.<sup>214</sup> During the depositions and while on the witness stand, both Beyer and Redmond either refused to answer petitioner's questions or feigned ignorance.<sup>215</sup> Despite orders to compel, Beyer refused to turn over the contents of the notes of her sessions with Redmond.<sup>216</sup>

### *B. Procedural History*

Judge Milton I. Shadur of the United States District Court for the Northern District of Illinois ordered Karen Beyer to turn over her notes made in sessions with Redmond, and rejected the argument that a psychotherapist-patient privilege protects the notes and the contents of their counseling sessions.<sup>217</sup> When respondents failed to divulge the contents of the conversations and the notes, Judge Shadur, in his instructions at the end of the trial,<sup>218</sup> told the jury that the refusal to

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208. *Jaffee*, 116 S. Ct. at 1926.

209. *Id.*

210. *Jaffee v. Redmond*, 51 F.3d 1346, 1350 (7th Cir. 1995).

211. *Id.*

212. *Jaffee*, 116 S. Ct. at 1926.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Jaffee v. Redmond*, 51 F.3d 1346, 1351-52 (7th Cir. 1995). All of the relevant oral rulings and memorandum opinions of the United States District Court for the Northern District of Illinois are unreported.

218. *Id.* at 1351-52 n.9. Jury Instruction No. 8 provided that:

You have heard the evidence in this case that Karen Beyer, while an employee of the Village of Hoffman Estates, had numerous conversations with Mary Lu Redmond and made notes of those conversations. You have also heard testimony that Ms. Beyer's notes were the property of the Village of Hoffman Estates.

comply with the order allowed the inference that the contents of the notes and conversations were unfavorable to respondents.<sup>219</sup> The jury awarded Jaffee \$45,000 on the federal claim, and \$500,000 under the Illinois wrongful death statute.<sup>220</sup>

The United States Court of Appeals for the Seventh Circuit reversed and remanded the case.<sup>221</sup> In doing so, it refused to compel Beyer to produce her notes and conversations on the basis that "reason and experience"<sup>222</sup> warranted the creation of a privilege protecting conversations and work product arising out of a psychotherapist-patient relationship.<sup>223</sup> It also found that such privilege was qualified, and would not apply if the evidentiary need for the production of notes and disclosure of conversations greatly outweighed the confidentiality and privacy needs of the patient.<sup>224</sup> In this case, the Court held that the evidentiary need for disclosure did not tip the scale because of the number of eyewitnesses to the event and the amount of available testimony.<sup>225</sup> Redmond's privacy needs, on the other hand, were substantial and essential to her recovery.<sup>226</sup>

The Seventh Circuit denied Jaffee's petition for rehearing on May 12, 1995.<sup>227</sup> Subsequently, Jaffee filed her writ of certiorari on August 10, 1995.<sup>228</sup> The United States Supreme Court granted Jaffee's petition on October 16, 1995,<sup>229</sup> and in its opinion of June 13, 1996, affirmed the decision of the Seventh Circuit.<sup>230</sup>

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During the course of this lawsuit, the Court ordered the Village of Hoffman Estates to turn over all of Ms. Beyer's notes to plaintiff's attorneys. The Village was provided with numerous opportunities to obey the Court's order and refused to do so. During the course of this lawsuit, Mary Lu Redmond also testified that she would not authorize or direct Ms. Beyer to turn over those notes to plaintiff's attorneys.

During Ms. Beyer's testimony she referred to herself as a "therapist," although she is not a psychiatrist or a psychologist—she is a social worker. This Court has ruled that there is no legal justification in this lawsuit, based as it is on a federal constitutional claim, to refuse to produce Ms. Beyer's notes of her conversations with Mary Lu Redmond, and that such refusal was unjustified.

Under these circumstances, you are entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.

*Id.*

219. *Id.* at 1351.

220. *Id.* at 1352.

221. *Id.* at 1346.

222. *Id.* at 1355.

223. *Id.* at 1357 n.18.

224. *Id.* at 1357.

225. *Id.* at 1358.

226. *Id.*

227. *Jaffee v. Redmond*, No. 94-1151, 1995 U.S. App. LEXIS 10909 (7th Cir. May 12, 1995).

228. Brief for Respondents at 1, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 96-266).

229. *Id.*

230. *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996).

## C. Supreme Court Review

## 1. Majority

The Supreme Court explored whether or not statements made to a therapist and the therapist's notes are protected from compelled disclosure in a federal civil action.<sup>231</sup> The Court noted that it was appropriate for federal courts to recognize a psychotherapist-patient privilege under Federal Rule of Evidence 501 when such a privilege is recognized by all fifty states.<sup>232</sup> Ultimately, the Court held that the conversations between Redmond and Beyer, including the notes Beyer took during their therapy sessions were protected from disclosure under Rule 501.<sup>233</sup> As a result of its holding, the Court established a new federal evidentiary privilege, that between psychotherapist and patient.<sup>234</sup>

The Court first acknowledged that evidentiary privileges are generally disfavored because such privileges can prevent the trier of fact from access to and consideration of highly probative evidence.<sup>235</sup> Rule 501 of the Federal Rules of Evidence allows for the definition and expansion of new privileges that are consistent with "common law principles . . . in the light of reason and experience."<sup>236</sup> The rule allows courts to develop privileges that changing times and changing circumstances require.<sup>237</sup> Although the common law and judicial rulings were once the only source of forward strides in evidentiary privileges, *Jaffee* indicates that state statutes can also fill that role.<sup>238</sup>

The Court noted that, in its development of the Federal Rules of Evidence, the Advisory Committee on the Federal Rules of Evidence defined nine specific testimonial privileges, including one which protects conversations between psychotherapists and their patients.<sup>239</sup> Congress rejected these nine outlined privileges in favor of a more flexible general rule.<sup>240</sup> The presence of the psychotherapist-patient privilege in the proposed rules, the Court noted, indicated an early

231. *Id.* at 1928. Justice Stevens delivered the opinion of the Court. *Id.* at 1925. His opinion was joined by Justices O'Connor, Kennedy, Souter, Thomas, Ginsburg, and Breyer. *Id.* Justice Scalia wrote a dissent, which was joined by Justice Rehnquist. *Id.* at 1933 (Scalia, J., dissenting).

232. *Id.* at 1929, 1930.

233. *Id.* at 1932.

234. *Id.*

235. *Id.* at 1928.

236. *Id.* at 1927.

237. See *supra* notes 93-94 and accompanying text.

238. *Jaffee*, 116 S. Ct. at 1930.

239. *Id.* at 1928 n.7; see *supra* note 64 and accompanying text.

240. 56 F.R.D 183, 234-58 (1972); see *supra* note 64 and accompanying text.

intention for such a privilege to exist.<sup>241</sup> The Court reasoned that it would not make sense for the privilege to be ascertainable in each and every state court, but not in the federal courts.<sup>242</sup>

The Court relied upon the policy rationale that in order for psychotherapy to be effective, it must have the foundation of an "atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."<sup>243</sup> The Court further reasoned that if the patient believes that his private interests, his "emotions, memories and fears" will be revealed in a courtroom or on paper, the patient's healing process will be severely hampered.<sup>244</sup>

The Court also reasoned that the psychotherapist-patient privilege served "public ends."<sup>245</sup> The majority believed that the public interest is served if persons such as Redmond can more easily benefit from psychotherapy.<sup>246</sup> The Court observed that it is in the public interest that law enforcement personnel receive effective treatment for mental health problems because of the dangerous and stressful situations they encounter daily.<sup>247</sup>

Lastly, the Court noted that all fifty states, including the District of Columbia, recognize some form of privilege between psychotherapists and their patients.<sup>248</sup> As the science and technique of psychotherapy have progressed, the various state legislatures followed. According to the Court, the federal courts should follow as well.<sup>249</sup> In conclusion, the Court warned against a conditional or qualified privilege, such as the one the Seventh Circuit defined.<sup>250</sup> The Court cautioned that "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>251</sup>

## 2. Dissent

In a scathing dissent, Justice Scalia, joined by Chief Justice Rehnquist, accused the majority of exploring only the psychotherapist-pa-

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241. *Jaffee*, 116 S. Ct. at 1930-31.

242. *Id.* at 1930.

243. *Id.* at 1928.

244. *Id.*

245. *Id.* at 1929 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), for the proposition that an asserted privilege must "serv[e] public ends").

246. *Id.*

247. *Id.* at 1929 n.10.

248. *Id.* at 1929-30.

249. *Id.* at 1930.

250. *Id.* at 1932.

251. *Id.* (quoting *Upjohn*, 449 U.S. at 393).

tient privilege, and then tacking clinical social workers onto that privilege as an afterthought.<sup>252</sup> In other words, the majority, according to Scalia, investigated only the narrow application of the privilege, and then stretched it out to a broad range of occupations.<sup>253</sup> He outlined the differences in education, training, and state statutory definitions of psychiatrists, psychologists, and social workers, and claimed that the majority was remiss not to explore those issues on its own.<sup>254</sup>

While the majority emphasized the increasing need in justice for such a privilege in changing society, and today's changing needs for psychotherapy, Justice Scalia saw the privilege as tipping the scale more toward the side of injustice.<sup>255</sup> He feared that, if the Court stretched evidentiary privileges to such a limit, it would be the very instrument of horrific injustices.<sup>256</sup> For example, he pointed out that if certain statements made in therapy are privileged, the vital evidence thereby withheld may be the foundation of a valid claim, or may be a defense in a criminal case that will set an innocent person free.<sup>257</sup>

Justice Scalia took harsh jabs at the majority, picking apart the "the states do it, why shouldn't we?" analysis.<sup>258</sup> He did not hesitate to point out that the state laws vary greatly in their definitions, restrictions and boundaries to such a degree that no "common law," as prescribed by Rule 501, can be ascertained, let alone standardized.<sup>259</sup> Scalia also suggested that the fact that all fifty states have enacted the privilege legislatively argued against a judicial adoption of the privilege.<sup>260</sup> To Scalia, the legislative actions suggested that the complexity of the privilege is better suited to careful, drawn out deliberation, and flexibility that only the legislature can provide.<sup>261</sup> In another vein, Justice Scalia said that, at the worst, the state legislation suggests that the privilege is best left to legislative bodies whom political pressure and interest groups influence.<sup>262</sup>

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252. *Id.* at 1933 (Scalia, J., dissenting).

253. *Id.*

254. *Id.* at 1937-38.

255. *Id.* at 1932.

256. *Id.*

257. *Id.* at 1933.

258. *Id.* at 1936.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

## III. ANALYSIS

*"And trust me not at all or all in all."*<sup>263</sup>

The Supreme Court decided *Jaffee v. Redmond* correctly because the establishment of a psychotherapist privilege is warranted under Rule 501's tenet of "reason and experience,"<sup>264</sup> and is supported almost unanimously by the legislatures of all fifty states.<sup>265</sup> However, this decision is not without its pitfalls. The Court in *Jaffee* fully discussed the impact and necessity of a psychotherapist privilege, and then proceeded to attach those same rationales to social workers and others less trained in the therapy field.<sup>266</sup> Most importantly, serious problems may arise when future courts, without further guidance from the Supreme Court, attempt to follow the precedent set in *Jaffee*.

Both the majority and the dissent incorporated a number of the theories, rationales, and tests outlined in Part I.<sup>267</sup> The majority began with a classic "traditional utilitarian" rationale,<sup>268</sup> and incorporated the reasoning of the value of privacy.<sup>269</sup> Using these rationales, the Court stated that the psychotherapist-patient privilege inherently satisfies not only constitutional issues of privacy, but also public interests.<sup>270</sup> As to the privacy issue, the Court correctly contrasted the psychotherapist-patient privilege with the physician-patient privilege.<sup>271</sup> The Court's utilitarian approach emphasized that the privilege protects and promotes the underlying function of psychotherapy, that of healing the mind.<sup>272</sup>

This analysis of the *Jaffee* opinion explores the Court's application of the Wigmore test,<sup>273</sup> its derivation of the privilege from state statutory laws,<sup>274</sup> the extension of the privilege to social workers,<sup>275</sup> and

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263. ALFRED LORD TENNYSON, MERLIN AND VIVIEN (1859), reprinted in OXFORD DICTIONARY OF QUOTATIONS 1.388 (Oxford University Press, 1979).

264. FED. R. EVID. 501; see *supra* notes 62-94 and accompanying text.

265. See *supra* note 165 and accompanying text.

266. *Jaffee*, 116 S. Ct. at 1931. "All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy." *Id.*

267. *Id.* at 1927-41.

268. See *supra* notes 144-48 and accompanying text.

269. See *supra* notes 150-56 and accompanying text.

270. *Jaffee*, 116 S. Ct. at 1929.

271. *Id.* at 1928.

272. *Id.* at 1929.

273. See *infra* Part III.A.

274. See *infra* Part III.B.

275. See *infra* Part III.C.

the manner in which both the majority and the dissent define the psychotherapist.<sup>276</sup>

### A. Wigmore Test Applied in *Jaffee*

The psychotherapist patient-privilege, as defined in *Jaffee*, meets the conditions of the four-part Wigmore test.<sup>277</sup> Although the majority did not directly cite to this test in its opinion, much of the reasoning seems to derive from the basic principles of the test.<sup>278</sup>

Under the first Wigmore condition, the *Jaffee* court indicated that the conversations between a psychotherapist and his patient do originate in a setting which promotes or relies upon the confidence that the content of any conversations will remain private.<sup>279</sup> The very nature of psychotherapy requires that the patient divulge to the therapist his most humiliating, most turbulent, and most disturbing thoughts, feelings, and dreams.<sup>280</sup> In that light, the relationship between a psychotherapist and his patient is highly confidential, and is understood as such by both patient and therapist.<sup>281</sup> It is, in fact, a professional duty and standard of responsibility among psychotherapists to keep their patients' confidences.<sup>282</sup>

The psychotherapist patient-privilege also meets the second Wigmore criterion, that the confidentiality must be essential to the complete maintenance and function of the relationship.<sup>283</sup> The Court in *Jaffee* relied upon this prong of the test, stating: "Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."<sup>284</sup> The Court also emphasized the fact that, without the privilege, many who could bene-

276. See *infra* Part III.D.

277. See *infra* notes 278-96 and accompanying text.

278. See *supra* notes 100-06 and accompanying text.

279. See *supra* notes 102-03 and accompanying text.

280. Brief for American Psychoanalytic Association as *Amicus Curiae* at 17, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266).

281. *Id.*

282. *Id.* (citing AMERICAN PSYCHOANALYTIC ASSOCIATION, PRINCIPLES OF ETHICS FOR PSYCHOANALYSIS AND PROVISIONS FOR IMPLEMENTATION OF THE PRINCIPLES OF ETHICS FOR PSYCHOANALYSTS § 6 (1983)).

283. See *supra* note 102-03 and accompanying text.

284. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996) (citing Brief for American Psychiatric Association et al. as *Amicus Curiae* at 14-17, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266); Brief for American Psychological Association as *Amici Curiae* at 12-17, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266)).



fit from psychotherapy would be deterred from seeking help because of the fear of disclosure.<sup>285</sup>

The Supreme Court did not directly discuss the third prong of the Wigmore test, but did touch upon the impact of public opinion when it discussed whether the privilege serves "public ends."<sup>286</sup> Under the third prong, the opinion of the community must be that the fruits of the relationship receive protection from compelled disclosure.<sup>287</sup> The Court pointed out that the privilege promotes "the mental health of our citizenry . . . [which in itself, is a] public good of transcendent importance."<sup>288</sup> In a footnote, the Court pointed out that *Jaffee* shows the importance of the counseling of police officers.<sup>289</sup> The public understands that officers such as Redmond face violence, danger, and personal tragedy on a daily basis, and that the stress caused leads to emotional numbing, frustration, "anxiety, depression, fear, or anger."<sup>290</sup> Those symptoms can interfere with the officer's reaction times, interactions with the community, and overall ability to perform her job.<sup>291</sup>

Finally, the Court addressed the fourth prong of the Wigmore test. This prong explores whether the injury that would occur from disclosure is greater than the benefit gained for evidentiary purposes.<sup>292</sup> The Court stated that "the likely evidentiary benefit that would result from the denial of the privilege is modest."<sup>293</sup> In the *Jaffee* case, especially, the nondisclosure of psychotherapy notes and conversations did not deny the plaintiff access to a sole source of evidence. Numerous eyewitnesses to the shooting and Officer Redmond herself testified at trial, and counsel cross-examined all witnesses.<sup>294</sup> Furthermore, as noted in the background section,<sup>295</sup> the psychotherapist is not likely to be a reliable and primary source of solid objective evidence. By contrast, the process of psychotherapy is concerned with purely subjective

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285. *Id.* at 1929.

286. *Id.*

287. *See supra* note 103 and accompanying text.

288. *Jaffee*, 116 S. Ct. at 1929.

289. *Id.* at 1929 n.10.

290. *Id.*

291. *Id.*; see S. Marans, *Community Violence and Children's Development: Collaborative Interventions*, in 11 *THE CHILD IN THE FAMILY* 109, 117 (C. Chiland & J.G. Young eds., 1994).

292. *See supra* note 103 and accompanying text.

293. *Jaffee*, 116 S. Ct. at 1929.

294. *Jaffee v. Redmond*, 51 F.3d 1346, 1358 (1995).

295. *See supra* Part I.

perceptions, feelings, concerns, and inner problems, bearing little resemblance or relationship to reality.<sup>296</sup>

In his dissent, Justice Scalia used a number of cases to support his proposition that Rule 501 has been and is to be read in a restrictive vein.<sup>297</sup> Many of the cases he cited,<sup>298</sup> such as *University of Pa. v. EEOC*,<sup>299</sup> and *United States v. Gillock*<sup>300</sup> not only fail Rule 501's "reason and experience" test, but also, as will be shown, fail Wigmore's four-part test. Therefore, Scalia's reliance on these cases is misplaced.

Under *Gillock*, the Supreme Court held that a state senator in Tennessee did not have the right of privilege against testifying in federal criminal prosecutions.<sup>301</sup> Applying the Wigmore test, *Gillock* fails on all four conditions. It fails the first condition because testimony by a state senator does not arise from a confidential setting where any conversations are guaranteed to remain private. The second condition is also missed since confidentiality is not essential to the function of any Senate relationship. Furthermore, the community does not expect that a state senator receive protection from compelled protection in a federal trial. Finally, the fourth factor is also missed in *Gillock* because the injury from withholding testimony is far greater than the injury caused by disclosure.

Justice Scalia also relied on *University of Pa.*<sup>302</sup> as support for his proposition that Rule 501 should be read restrictively.<sup>303</sup> However, this case also fails the four part Wigmore test. Again, the contents of peer-review and tenure-review materials do not arise out of an inherently confidential setting. The community does not expect or rely upon the fact that tenure-review materials are to be kept confidential, and in the case of sexual and racial discrimination, the injury to the employer by disclosure is far less than the injury to the plaintiff if he

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296. Brief for American Psychoanalytic Association as *Amicus Curiae* at 22-23, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996) (No. 95-266); see *supra* notes 123-43 and accompanying text.

297. *Jaffee*, 116 S. Ct. at 1933 (Scalia, J., dissenting).

298. *Jaffee*, 116 S. Ct. at 1933.

299. 493 U.S. 182 (1990).

300. 445 U.S. 360 (1980).

301. *Gillock*, 445 U.S. at 373.

302. 493 U.S. 182 (1990). This case involved an associate professor who was passed up for tenure at the University of Pennsylvania. *Id.* at 185. The professor filed a charge with the Equal Employment Opportunity Commission ("EEOC") which alleged that the University discriminated against her on the basis of her race, sex, and national origin in violation of Title VII of the Civil Rights Act of 1964. *Id.* The EEOC issued a subpoena seeking tenure review files, and the University refused to turn them over. *Id.* at 186-87. The EEOC then sought enforcement of the subpoena with the United States District Court of Pennsylvania. *Id.* at 187. The court granted the enforcement order and the Third Circuit affirmed the decision. *Id.* The Supreme Court held that peer review or tenure review materials are not privileged. *Id.* at 188-89.

303. *Jaffee*, 116 S. Ct. at 1933 (Scalia, J., dissenting).

cannot use peer-review and tenure-review materials to prove discrimination or pretext. The only prong of the Wigmore test that may hold some credence here is that during the actual peer-review and tenure-review process, confidentiality may be an absolute necessity. However, as the evidentiary questions in *University of Pa.* occurred after the alleged review ended,<sup>304</sup> the need for confidentiality was diminished.

Finally, Justice Scalia tried to equate the role of a psychotherapist to that of "parents, siblings, best friends, and bartenders—none of whom was awarded a privilege against testifying in court."<sup>305</sup> While the idea of keeping conversations with mom and dad, Joe the local bartender, or a trusted friend under wraps may be appealing, the importance of protecting the fruits of those relationships is hardly as compelling as the importance of protecting the confidentiality between a psychotherapist and his patient.<sup>306</sup> Furthermore, Justice Scalia's purported bartender-patron privilege fails to meet all four requirements of the Wigmore test. Even if the bartender privilege can squeeze by the first three prongs of the test, which it just might, it fails miserably on the fourth prong. What possible injury could occur from the disclosure of a confession to, or search for advice from a bartender? Possibly the worst that can happen is that the patron refuses to return to the bar. That risk can hardly be said to be of greater weight than the need for the use of the confidential statements as evidence. Scalia's proposed bartender-patron privilege carries none of the necessities for confidentiality, and does not rely upon complete trust and secrecy to further its purpose. If the courts follow the lead of the Supreme Court in applying the general principles of the Wigmore test to the analysis of privileges, Justice Scalia's fears of a privileged communications deluge will continue to be unfounded.

### *B. The Privilege from State Statutory Laws*

The Supreme Court drew support from state statutory laws in its recognition of a psychotherapist-patient privilege.<sup>307</sup> Although there is some disagreement among the states concerning the scope of the privilege, the Supreme Court found most significant the fact that all fifty states at the least recognize that the privilege exists.<sup>308</sup> State psychotherapist privileges would be substantially thwarted if they were

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304. *University of Pa.*, 493 U.S. at 188-89.

305. *Jaffee*, 116 S. Ct. at 1934.

306. See *supra* notes 144-56 and accompanying text.

307. *Jaffee*, 116 S. Ct. at 1929-30.

308. *Id.*

not recognized at the federal level. According to the Court, "any state's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court."<sup>309</sup> Furthermore, the recognition of the privilege makes the therapist's job easier. According to the American Psychological Association, a therapist must, at the beginning of a course of therapy, disclose to the patient any limits on the confidentiality of their relationship.<sup>310</sup> Imagine a psychotherapist informing a patient that if the patient is sued in a state court, the therapist cannot divulge any part of the patient's conversation with him. Then the patient is informed that if he is sued in a federal court, there is a chance that the therapist will be compelled to testify. The Court is correct in its assessment that the very purpose of the state privilege statutes, that of encouraging and supporting confidential communication, would be seriously hampered if the privilege is not recognized in federal court.<sup>311</sup>

### C. *Extending the Privilege to Social Workers*

Justice Scalia, in his dissent, accused the majority of tacking the rationales behind the creation of a social-worker privilege on to the rationales behind the creation of a psychotherapist-patient privilege.<sup>312</sup> Scalia made a valid point by showing that the majority's methodology—that of fully exploring the more general rule and then merely stating that the tenets of that rule apply to the more specific—is flawed.<sup>313</sup> However flawed the methodology may be, the reasoning of the majority is sound.

The majority cured those flaws by demonstrating that the privilege described for psychotherapists applies "with equal force" to clinical social workers.<sup>314</sup> The Court discussed the increasing amount of mental health treatment provided by social workers, and other mental health workers whose positions require less education and less accreditation than psychotherapists and psychologists.<sup>315</sup> Furthermore, the Court stated that the clients of social workers are often those who are unable to afford treatment by a psychologist or psychotherapist.<sup>316</sup>

309. *Id.* at 1930.

310. *Id.* at 1930 n.12 (citing AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Standard 5.01 (Dec. 1992)).

311. *Jaffee*, 116 S. Ct. at 1930.

312. *Id.* at 1933 (Scalia, J., dissenting).

313. *Id.*

314. *Id.* at 1931.

315. *Id.*

316. *Id.* (citing Brief for National Association of Social Workers as *Amici Curiae* at 6-7, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1997) (No. 95-266)). Although the Court did not directly state it, a

*D. Approaches to Defining the Professional*

In her Note, Dubbelday explored three approaches to the definition of a therapist: the credential approach, the functional approach, and the judicial discretion approach.<sup>317</sup> While the credential and functional approaches do not appear to be polar opposites, the application of each can yield very different results in determining to whom the privilege should apply.<sup>318</sup>

The majority used the functional approach to outline the scope of the psychotherapist-patient privilege.<sup>319</sup> It emphasized the "atmosphere of confidence and trust" required across the board in all aspects of mental health treatment,<sup>320</sup> and gave great weight to the fact that social workers and counselors are slowly providing more and more of a majority of mental health services in this country.<sup>321</sup> The majority asserted that psychotherapists, psychologists, social workers, case workers, and counselors all serve essentially the same purpose as psychotherapists, that of providing quality mental health services.<sup>322</sup> They also serve the same public goal, that of "the mental health of our citizenry."<sup>323</sup> The majority clearly demonstrated that it used the therapist's function to sketch the outline of the privilege.<sup>324</sup>

As stated in Part I, the credential approach focuses on the educational level, licensing and certification of the individual.<sup>325</sup> By comparison to the attorney-client privilege, Justice Scalia indicated that he would design a psychotherapist-patient privilege around the professional status of the individual.<sup>326</sup> He related the majority's functional approach to extending the attorney-client privilege to paralegals, or to tax-advisors under the auspices of a "legal advisor" privilege,<sup>327</sup> and

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disparate treatment issue arises here. If the privilege was limited to psychotherapists or psychiatrists only, those who are unable to afford their services would not receive the same protection from disclosure as those who are able to afford psychotherapy. The Court pointed out that because the services rendered by social workers "serve the same public goals" as those of a psychotherapist, there is no reason not to protect the fruits of therapy performed by a social worker. *Id.*

317. Dubbelday, *supra* note 10, at 813; *see supra* notes 128-43 and accompanying text.

318. *See supra* notes 129-41 and accompanying text.

319. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928-32 (1997).

320. *Id.* at 1928.

321. *Id.* at 1931.

322. *Id.* at 1931-32.

323. *Id.* at 1929, 1931.

324. *Id.* at 1928-32.

325. *See supra* notes 129-34 and accompanying text.

326. *Jaffee*, 116 S. Ct. at 1933 (Scalia, J., dissenting).

327. *Id.*

then questioned the majority's broadening of the psychotherapist-patient to social workers and counselors.<sup>328</sup>

In sum, the Supreme Court's rationales in establishing a psychotherapist-patient privilege were warranted, sound, and based in established legal theory, and constitutional policy. The privilege, as defined by the Court, meets the four-part test delineated by Wigmore, and is well established in state statutory law. Although the Court, without an articulated justification, extended the privilege to professionals with less training than psychotherapists, it succeeded in showing that such an extension was warranted. The Court was justified in its extension of the privilege to social workers and other mental health workers in light of the increasing amount of services provided by lesser trained professionals.

#### IV. IMPACT

*In Venice they do not let heaven see the pranks  
They dare not show their husbands; their best conscience  
Is not to leave't undone, but keep't unknown.*<sup>329</sup>

At the outset, the impact of *Jaffee* is to create and recognize a new testimonial privilege in federal courts—that between a psychotherapist and his patient. The Supreme Court, in its failure to “delineate [the] full contours” of the privilege,<sup>330</sup> left a large number of questions open for future courts to address.

##### A. Carving out Exceptions

In a footnote, the Court in *Jaffee* acknowledged that “there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of disclosure by the therapist.”<sup>331</sup> However, that “duty to warn” is the only exception the Court advocated. The Court implied that, not only is the duty to warn an affirmative duty, it creates in itself an exception to the psychotherapist-patient privilege in a courtroom setting—especially in commitment proceedings.<sup>332</sup> Many state courts provide for specific exceptions to the psychotherapist-patient privi-

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328. *Id.* at 1937.

329. WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3.

330. *Jaffee*, 116 S. Ct. at 1932.

331. *Id.* at 1932 n.19. In this footnote, the court essentially recognized the *Tarasoff/Menendez* line of cases in California which create an explicit “duty to warn” exception to the privilege. *Id.*; see *supra* notes 173-88 and accompanying text.

332. Note, *Professional Obligation and the Duty to Rescue: When Must a Psychiatrist Protect His Patient's Intended Victim?*, 91 YALE L.J. 1430, 1445 (1982).

lege,<sup>333</sup> creating the possibility of additional circuit splits and differences over exceptions to the privilege.

Prior to the *Jaffee* decision, a patient or a therapist could tell whether the content of therapy sessions would be protected from disclosure in federal courts. The answer was no. Now, after *Jaffee*, the answer is yes. However, because the exceptions to the privilege vary and differ from jurisdiction to jurisdiction, a therapist or a patient cannot be certain whether the topic of a therapy session will fall under an exception of a state or federal district court. The Supreme Court's failure to completely flesh out the privilege undermines its attempt to create a secure and predictable privilege for psychotherapists, social workers, and their patients.

### *B. Scope of The Privilege Under Jaffee*

Another issue the Court left open is the exact scope of the privilege. The Court explored the privilege in terms of a psychotherapist, and followed with an application of that privilege to social workers.<sup>334</sup> Although Illinois and other states specifically define the professional and licensing limits of the individuals to whom the privilege applies, the Court in *Jaffee* did not. Again, the Court left it to the federal circuit and district courts to define the parameters for themselves. For example, an attorney-client privilege or a spousal privilege is relatively easy to define. An attorney is an individual who holds a law license. A spouse is the person the defendant or claimant has married. On the other hand, the psychotherapist-patient privilege as defined in *Jaffee* is not as concrete. If the privilege was restricted to psychotherapists only, the parameters would be easily defined, but the Court's extension of the privilege to social workers such as Karen Beyer creates difficulty in defining the exact scope of the privilege. Despite the difficulties in application, the broad application to social workers is beneficial not only for social workers, but for those patients who cannot afford the services of a fully accredited, licensed, and educated psychotherapist. However, if the Court is to extend the privilege to those less educated than psychotherapists, the exact scope of the privilege should be clearer. Perhaps the solution lies not in looking at the educational level of the therapist, but rather, the therapist's core functions. The question should not depend on the entirety of the social worker's job, which may include evaluations outside the therapist's office. Rather, it should perhaps depend on his singular role as

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333. See *supra* notes 173-88 and accompanying text.

334. *Jaffee*, 116 S. Ct. at 1931.

"counselor." The privilege should be limited to the roles which require that: (1) conversations originate in a confidential setting, (2) confidentiality be essential to the function of the relationship, and (3) breach of confidentiality would severely injure the patient.<sup>335</sup> Until either the courts or the legislatures limit the privilege, it will be tested time and time again.

Already, two cases have put the scope of the privilege to the test. Less than four months after the decision in *Jaffee*, the Eastern District of Wisconsin faced a claim of therapist-patient privilege. In *United States v. Schwensow*,<sup>336</sup> the defendant used the telephone at an Alcoholics Anonymous center to call a drug detox facility.<sup>337</sup> Schwensow claimed that statements he made to two Alcoholics Anonymous volunteer workers were protected by a "therapist-patient" privilege in light of the Supreme Court's decision in *Jaffee*.<sup>338</sup> The Eastern District of Wisconsin held that the communications were not privileged because Schwensow did not make the statements in confidence;<sup>339</sup> the two volunteer workers were not licensed alcoholism counselors; and Schwensow had no reasonable basis to believe that they were licensed.<sup>340</sup> Therefore, the Court held that the statements were not made for the purposes of analysis or treatment.<sup>341</sup>

Even though the court in *Schwensow* did not recognize the privilege, another case from the Eastern District of Pennsylvania did. In *Greet v. Zagrocki*,<sup>342</sup> a case brought under 42 U.S.C. § 1983 against the City of Philadelphia, the plaintiff alleged that one of its police officers, Zagrocki, forced his way into the plaintiff's building and held him and others at gunpoint for an hour for no apparent reason.<sup>343</sup> In order to support his allegation that the city knew of Zagrocki's alcohol problems, plaintiff requested that the city produce Zagrocki's files from the Employee Assistance Program ("EAP"), including "documents maintained by any in-house alcohol dependency program operated for the benefit of police personnel."<sup>344</sup> The city ultimately objected to this request, claiming privilege.<sup>345</sup> Although this case is factually similar to *Jaffee*, the City did not specify what privilege it was

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335. See *supra* text accompanying note 103.

336. 942 F. Supp. 402 (E.D. Wis. 1996).

337. *Id.* at 405.

338. *Id.* at 403.

339. *Id.* at 407-08.

340. *Id.*

341. *Id.* at 408.

342. No. CIV-A-96-2300, 1996 WL 724933, at \*1 (E.D. Pa. Dec. 16, 1996).

343. *Id.*

344. *Id.*

345. *Id.*



claiming.<sup>346</sup> Therefore, the Court reasoned that because of "the fact that the EAP engages in sensitive counseling on problems of alcohol dependency . . . the City is advancing an argument based on the psychotherapist-patient privilege."<sup>347</sup> Ultimately, the Court asserted the privilege on behalf of the city and Zagrocki, and held that the EAP files would be sheltered from disclosure under a psychotherapist-patient privilege.<sup>348</sup>

*Schwensow* and *Greet* are examples of how parties, following *Jaffee*, may attempt to push the limits of the psychotherapist-patient privilege in terms of defining the professional. In fact, the court in *Greet* completely disregarded whether Zagrocki engaged in therapy sessions with a psychotherapist or social worker in the EAP. The Court then reasoned that the fact that Zagrocki engaged in some form of counseling was enough to engage the privilege and protect the communications and products of that counseling.<sup>349</sup>

### C. *Mixed Claims Under Federal and State Law*

Yet again, the Court's failure to completely flesh out the issues leaves future courts with dilemmas of their own. In *Jaffee*, the Supreme Court only resolved that in cases involving federal question, a privilege exempts psychotherapists or licensed social workers from testifying about communications with his patient, or from turning over his records. However, the Court did not directly address an issue central to *Jaffee* itself. What rule, federal or state, applies if the plaintiff brings claims both under federal and state laws? In *Jaffee*, claims were brought against Redmond under both 42 U.S.C. § 1983, and under the Illinois Wrongful Death Act, 740 ILCS 180/1 (1994).<sup>350</sup> Keep in mind that under Rule 501, federal common law governs privileges raised under federal question jurisdiction, and state statutory law governs claims to privilege in state law claims.<sup>351</sup> The Court, in a footnote, merely observed that "there is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law."<sup>352</sup> In the same footnote, the Court shrugged off the issue, noting merely that the "parties do

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346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at \*1-\*2.

350. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1926 (1997).

351. *Id.* at 1931 n.15; see Martin A. Schwartz, *Supreme Court Recognizes Psychotherapist Privilege*, N.Y. LAW J., July 16, 1996, at 3; see *supra* notes 90-92 and accompanying text.

352. *Jaffee*, 116 S. Ct. at 1931 n.15.

not raise this question.”<sup>353</sup> It should be noted that the dominant view on this issue is that federal common law controls evidentiary privileges for all claims brought with a federal question claim.<sup>354</sup>

## V. CONCLUSION

*I have done one braver thing  
Than all the Worthies did,  
And yet a braver thence doth spring,  
Which is, to keep that hid.*<sup>355</sup>

The *Jaffee* decision, although correctly decided in light of the “reason and experience” called for in Federal Rule of Evidence 501, was not detailed enough in its application to be of true use to federal courts faced with the issue of a psychotherapist-patient privilege.

If defining the exact outlines of the psychotherapist-patient privilege is outside the power of the courts, Congress should step in and adopt an explicit privilege similar to Proposed Rule 5.04.<sup>356</sup> A psychotherapist-patient privilege adopted by Congress should be uniform, efficient, and easy to define and to apply in the federal courts. Congress should also look to the wishes of the Supreme Court as outlined in *Jaffee*, as well as the experience of the state courts and legislatures in their applications of the psychotherapist-patient privilege.

Despite the difficulties encountered in the application and determination of the psychotherapist-patient privilege, the many benefits from the recognition of the privilege are of growing importance in our increasingly stressful American society. The psychotherapist-patient privilege allows the patient the ability to speak freely to his therapist without fear of public disclosure, humiliation, or embarrassment.<sup>357</sup> More and more Americans who need the help of a psychiatric professional, will more readily seek it. This not only benefits the patient, but American society as a whole.<sup>358</sup> However, the privilege requires much refinement, solidification, and limitation.

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353. *Id.*

354. See *Von Bulow v. Von Bulow*, 811 F.2d 136, 141 (2d. Cir. 1987).

355. JOHN DONNE, *THE UNDERTAKING*, reprinted in *OXFORD DICTIONARY OF QUOTATIONS* (Oxford University Press, 1979).

356. See *supra* note 169 and accompanying text.

357. *Jaffee*, 116 S. Ct. at 1928.

358. *Id.* at 1929.

